



The Comptroller General  
of the United States

Washington, D.C. 20548

*Wood*

## Decision

Matter of: Duracell U.S.A.

File: B-225416

Date: January 7, 1987

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### DIGEST

A telegram received by an agency prior to bid opening purporting to be a protest and stating that details would follow later is not sufficient to constitute a protest of an alleged solicitation impropriety, and therefore a protest to the General Accounting Office of the same alleged impropriety filed after bid opening is dismissed as untimely.

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### DECISION

Duracell U.S.A. protests the procurement of magnesium batteries by the U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, under invitation for bids (IFB) No. DAAB07-86-B-C034. We dismiss the protest as untimely.

The agency issued the IFB on July 11, 1986, seeking bids for a 1-year requirements contract for up to 1.2 million magnesium batteries. The bid opening date, as extended, was September 9. On September 8, the contracting officer received a telegram from Duracell protesting the award of a contract for batteries and indicating that support for the protest would follow under separate cover. By letter dated September 9, and received by the contracting officer on September 11, Duracell argued in detail that the Army should procure lithium batteries rather than magnesium batteries because of the performance and overall cost advantages of the lithium battery. The agency, which had opened bids on September 9 as scheduled, denied Duracell's protest on October 10. Duracell filed a similar protest here on October 23, which the agency contends is untimely. We agree.

Our Bid Protest Regulations provide that a protest based upon an alleged impropriety in a solicitation that is apparent prior to bid opening must be filed prior to bid

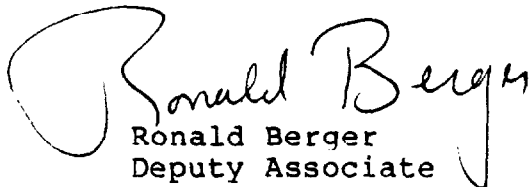
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opening. 4 C.F.R. § 21.2(a)(1) (1986). If a protest is filed initially with the contracting agency, any subsequent protest to this Office filed within 10 working days of when the protester learns of initial adverse agency action on the agency-level protest will be considered, provided the initial protest to the agency was timely. 4 C.F.R. § 21.2(a)(3).

Here, the agency's allegedly improper decision to procure magnesium batteries rather than lithium batteries was apparent from the solicitation. Thus, to be timely, a protest of this decision must have been filed prior to bid opening, a requirement that was not met in this case since, in our view, Duracell did not file a timely protest with the agency. All that the agency received prior to bid opening was a telegram stating that Duracell was protesting the solicitation and promising to provide details later. The telegram did not raise any specific grounds of protest, and therefore was not sufficient to constitute a protest. Pacific Fabrication--Request for Reconsideration, B-224065.2, Sept. 9, 1986, 86-2 CPD ¶ 277.

The protester argues that the telegram received by the agency prior to bid opening was indeed a timely protest because the agency had actual knowledge of the basis for protest and in fact treated the mailgram as a timely protest. The agency's consideration of Duracell's objections to this procurement appears to have been based on the letter received from the firm after bid opening, however, rather than its telegram of September 8. In any event, the timeliness requirements of this Office cannot be waived by an agency's consideration of an agency-level protest that we determine to have been untimely filed. Unicom System, Inc., B-222601.4, Sept. 15, 1986, 86-2 CPD ¶ 297.

The protest is dismissed.

  
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